

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT  
OF THE TTAB

Mailed: February 20, 2003

Paper No. 19

Rls

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Daniel J. Evans

Serial No. 75/979,988

Joseph W. Berenato, III of Liniak, Berenato, Longacre & White, LLC for Daniel J. Evans.

Khanh Le, Trademark Examining Attorney, Law Office 104 (Michael Hamilton, Managing Attorney).

Before Simms, Seeherman and Drost, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Daniel J. Evans (hereafter applicant) has appealed from the final refusal to register the mark ICESPIKE for services now identified as maintenance services, namely, freezing of fluid lines, in Class 37.<sup>1</sup> The Examining Attorney has refused registration on the ground that the specimen is unacceptable because it does not show use of

<sup>1</sup> Application Serial No. 75/979,988, created as a divisional application on Nov. 1, 2000.

Serial No. 75/979,988

the mark ICESPIKE for applicant's maintenance services but rather is used to refer to a freezing device or plumbing tool. Applicant has appealed and both the Examining Attorney and applicant have submitted briefs. No oral hearing was requested.

The record in this case shows that applicant originally filed an intent-to-use application (Serial No. 75/556,521) to register the mark ICESPIKE on September 21, 1998, for goods amended to read "manually-operated plumbing tool for freezing fluid lines for the purpose of maintenance," in Class 8, and for "maintenance services, namely, freezing of fluid lines," in Class 37. The mark was published for opposition on October 26, 1999, and a notice of allowance was issued thereafter. On July 17, 2000, applicant filed both a statement of use as well as a request to divide the original application, retaining the goods in the parent application and creating the instant divisional application for the maintenance services.<sup>2</sup> The statement of use indicated that applicant began use of his mark for the services in June 1998 and commenced first use in commerce in April 2000. The statement of use further indicated that the mark ICESPIKE was used on brochures,

---

<sup>2</sup> According to Office records, applicant has filed a number of extensions of time in which to file a statement of use in the parent application.

Serial No. 75/979,988

letterheads and promotional materials. The specimen is reproduced below:<sup>3</sup>

Orlando, Florida 32816 68894

**FREEZETEC, INC.**  
'Pipe Freezing Service'

(407) 650-0800 Fax  
(407) 890-3880 Jgml Page

•INTRODUCING THE NEW **ICESPIKE** FREEZING DEVICE•  
CALL: (407) 257-4756 FOR AN ESTIMATE.

••FREEZES WATERLINES EVEN WITH MINOR FLOW / VALVE LEAKAGE••  
••PREVENTS DRAINING OF SYSTEM WHILE KEEPING MAIN SYSTEM IN OPERATION••  
••PREVENTS LOSS OF CHEMICAL TREATMENT AND LOSS OF MAN HOURS VENTING EACH COIL••  
••PREVENTS POSTPONING REPAIRS / REPLACEMENT UNTIL THOSE COLD JANUARY NIGHTS••



16" SCHEDULE 40 STEEL PIPE  
PRESSURE TESTED AND CERTIFIED BY AN INDEPENDENT TESTING LABORATORY  
TO EXCEED FIVE TIMES NORMAL WORKING PRESSURE.



ICE PLUG IS REMOVED LATER

NO PIPE TOO BIG... NO PIPE TOO SMALL...

TEST RESULTS ARE AS FOLLOWS:

<sup>3</sup> The specimen of record states, in part: "FREEZETEC, INC. 'Pipe Freezing Service' •INTRODUCING THE NEW **ICESPIKE** FREEZING DEVICE•  
CALL: (407) 257-4756 FOR AN ESTIMATE ••FREEZES WATERLINES EVEN WITH MINOR FLOW/VALVE LEAKAGE•• ••PREVENTS DRAINING OF SYSTEM WHILE KEEPING MAIN SYSTEM IN OPERATION•• ••PREVENTS LOSS OF CHEMICAL TREATMENT AND LOSS OF MAN HOURS VENTING EACH COIL•• ••PREVENTS POSTPONING REPAIRS/REPLACEMENT UNTIL THOSE COLD JANUARY NIGHTS••"

The Examining Attorney argues that this specimen of use shows the mark ICESPIKE being used to identify and refer to applicant's plumbing tool and not to his maintenance service. That is, the specimen does not evidence use of the mark in the sale or advertising of applicant's service of freezing fluid lines but identifies only the freezing device or tool used in rendering applicant's service. The Examining Attorney acknowledges that the mark ICESPIKE appears in close proximity to the words "Pipe Freezing Service," but the mark does not identify this service, according to the Examining Attorney.

While it is clear that the applicant offers pipe freezing services, it is equally clear that the mark "icespike" is not being used to describe such services. The mark appears only once in the specimen and it is used in association with the words, "freezing device." The fact that the mark is in close proximity to the phrase "pipe freezing service," does not change this result. In fact, consumers are more likely to perceive the words, "Freezetec, Inc.," as the mark that is associated with the pipe freezing services, than the mark at issue.

Brief, 4.

Applicant, on the other hand, contends that the specimen shows a direct association between the mark and applicant's services because the mark appears directly below the words "Pipe Freezing Service." Also, applicant points to the words "freezes waterlines" beneath the mark

showing use, according to applicant, in the promotion of his maintenance services. The fact that applicant also uses the name to identify a product used to perform the freezing does not lead to the conclusion, according to applicant, that consumers do not recognize that applicant is using the mark for maintenance services. Applicant maintains, therefore, that the mark functions as both a trademark and a service mark.

The specimen submitted to show use of this term as a service mark is a brochure that identifies Applicant's pipe freezing services and his ICESPIKE freezing device... In the present case, these brochures of record are the advertising materials the applicant uses to advertise and sell its [sic] service. The service offered by Applicant ("pipe freezing") is clearly identified on the specimen, as is the mark ICESPIKE. Prospective customers are presented with...this brochure when Applicant offers its [sic] pipe freezing services, see the name ICESPIKE in close proximity to the phrase "pipe-freezing service," and will understand that the service being offered, as well as the tool used in performing the service, is identified by the mark ICESPIKE.

Request for Reconsideration, filed April 25, 2002, p. 1, 2.

A service mark specimen must show the mark as actually used in the sale or advertising of the services recited in the application. See TMEP §1301.04. As indicated in TMEP §1301.04(a):

To show service mark usage, the specimens must show use of the mark in a manner that

would be perceived by potential purchasers as identifying the applicant's services and indicating their source.

In other words, the specimens must show use of the service mark in direct association with the recited services in the sale or advertising of those services. *In re Universal Oil Products Co.*, 476 F.2d 653, 177 USPQ 456 (CCPA 1973).

Upon careful consideration of this record and the arguments of the attorneys, we agree with the Examining Attorney that the specimen of record does not show use of the mark ICESPIKE in connection with applicant's maintenance services. The specimen indicates that applicant is introducing the "new ICESPIKE freezing device." The specimen goes on to indicate that this device freezes water lines, prevents draining of the system while keeping the main system in operation, prevents loss of chemical treatment and loss of man hours in venting each coil, etc. While the mark does appear beneath the words "Pipe Freezing Service," the mark is not used to identify that service but rather to identify applicant's new freezing device. Applicant's pipe freezing service is identified by the mark FREEZETEC, INC., shown at the top of the specimen. Accordingly,

Serial No. 75/979,988

the specimen of record does not show use of the mark herein sought to be registered for applicant's maintenance services. See, for example, *In re Universal Oil Products Co.*, *supra* (term that identified only a process held not registrable as service mark, even though applicant was rendering services and the services were advertised in the same brochure in which the name of the process was used); *In re Johnson Controls, Inc.*, 33 USPQ2d 1318 (TTAB 1994)(labels affixed to packaging of valves do not show use of mark for custom manufacturing of valves); and *In re British Caledonian Airways Ltd.*, 218 USPQ 737 (TTAB 1983)(holding that the mark SKYLOUNGER identified applicant's first-class seats and was not used as a service mark to identify its air transportation service).

Decision: The refusal of registration is affirmed.